

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Richard F. Cole
Dr. Mark O. Barnett

In the Matter of

POWERTECH USA, INC.

(Dewey-Burdock In Situ Uranium Recovery
Facility)

Docket No. 40-9075-MLA
ASLBP No. 10-898-02-MLA-BD01
October 4, 2010

ORDER
(Prehearing Conference Call Summary and Initial Scheduling Order)

In the above-captioned proceeding, the Board granted hearing requests by the Consolidated Intervenors¹ and the Oglala Sioux Tribe to challenge the application of Powertech (USA), Inc., for a license to construct and operate a proposed in-situ leach uranium recovery facility in Custer and Fall River Counties, South Dakota.² On September 23, 2010, this Board convened a prehearing conference call to discuss case management and scheduling. Based on the input we received from the parties,³ the Staff's projected schedule, our analysis of the regulations, and the nature and circumstances of this case, the Board issues this initial scheduling order. This order lays out specific deadlines for the parties, in addition to the general deadlines and time frames applicable to Subpart L proceedings under 10 C.F.R. Part 2.

¹ Consolidated Intervenors consist of Susan Henderson, Dayton Hyde, and Aligning for Responsible Mining (ARM). See Licensing Board Order (Accepting Elections Regarding Representation) (Aug. 17, 2010) (unpublished).

² LBP-10-16, 72 NRC ___ (slip op.) (Aug. 5, 2010).

³ Pursuant to 10 C.F.R. § 2.1202(b)(2), NRC Staff notified the Board that it will participate as a party on all admitted contentions. See NRC Staff's Notification Under 10 C.F.R. § 2.1202(b)(2) (Aug. 13, 2010).

A. Classification of Contentions

In its August 5, 2010 order granting the hearing requests by the Consolidated Intervenors and the Oglala Sioux Tribe, the Board admitted three of Consolidated Intervenors' contentions and four of the Oglala Sioux Tribe's contentions.⁴ As part of its order scheduling the September 23rd initial prehearing conference call, the Board asked, in part, that the parties be prepared to discuss which admitted contentions should be viewed as safety contentions and which should be viewed as environmental contentions.⁵

In accordance with the August 13th order, the parties indicated during the prehearing conference call that they had come to a general agreement with regard to the classification of the seven contentions in this proceeding.⁶ The parties stated that they considered contentions K, 1, and 4 to be environmental contentions, while they classified contentions 2 and 3 as safety contentions.⁷ Additionally, the parties stated that while contentions D and E were primarily safety contentions, these contentions also had strong environmental concerns and thus should be classified as both safety and environmental contentions.⁸

B. Mandatory Disclosures

1. Timing of Disclosures

⁴ LBP-10-16, 72 NRC ___ (slip op.).

⁵ See Licensing Board Order (Scheduling Initial Telephone Prehearing Conference Call) (Aug. 13, 2010) at 2 (unpublished).

⁶ Tr. at 416–20. Counsel for the NRC Staff spoke on behalf of all of the parties. Id. at 414.

⁷ Id. at 416–20. Counsel for the Oglala Sioux Tribe agreed with these classifications but stated that there are significant environmental components present in contentions 2 and 3. Id. at 418–19. Counsel for the Oglala Sioux Tribe and for the Consolidated Intervenors also clarified that they did not intend for these classifications to have a later impact in the hearing process and that they do not want contentions currently classified as safety contentions to be heard prior to the issuance of the Final Supplemental Environmental Impact Statement (FSEIS). See id.

⁸ Id. at 416–17.

Pursuant to 10 C.F.R. § 2.336, the parties and NRC Staff are required to make and continually update certain mandatory disclosures.⁹ Additionally, NRC Staff is required to produce and update a hearing file.¹⁰

The Board issued an order on September 2, 2010 extending the deadline for initial disclosures until September 13, 2010.¹¹ Accordingly, on September 13, 2010, the parties filed their initial disclosures, and the Staff filed its hearing file.¹²

Based on the parties' agreement expressed during the September 23, 2010 prehearing conference call,¹³ the Board directs that parties and the NRC Staff shall update their disclosures and the hearing file monthly, on the first business day of every month.

2. Electronically Stored Information

Electronically stored information ("ESI") that is considered reasonably accessible may be subject to mandatory disclosure under 10 C.F.R. § 2.336 or production under 10 C.F.R. § 2.1203.¹⁴ During the prehearing conference call on September 23, 2010, the parties indicated

⁹ The term "mandatory disclosures" includes the witness lists and privilege logs required under 10 C.F.R. § 2.336.

¹⁰ See 10 C.F.R. § 2.1203.

¹¹ Licensing Board Order (Granting Joint Motion for Extension of Time) (Sept. 2, 2010) at 2 (unpublished).

¹² See Applicant Powertech (USA) Uranium Corporation's Initial Mandatory Disclosures (Sept. 13, 2010); Intervenors' Joint Initial Disclosures under 10 CFR § 2.336 (Sept. 13, 2010); Letter from Patricia A. Jehle, Counsel for NRC Staff, to Licensing Board (Sept. 13, 2010).

¹³ See Tr. at 424. Acting as spokesman for the parties, Counsel for the NRC Staff stated that the parties had informally agreed to update mandatory disclosures and the hearing file on the first business day of every month. Id.

¹⁴ See Fed. R. Civ. P. 16(b)(3)(B)(iii) (scheduling order may "provide for disclosure or discovery of electronically stored information"(emphasis added)), 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause,

that they had not yet come to an agreement with regard to the production of ESI but agreed to meet in the next few weeks to discuss the issue.¹⁵ The Board hereby directs the parties to confer regarding the production of ESI in this proceeding and to update the Board on or before October 15, 2010 with the results of those discussions.

3. Privilege Logs

As part of their disclosure requirements, parties must produce “[a] list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.”¹⁶ These are referred to as privilege logs. As agreed to by the parties, privilege logs shall be updated concurrently with the mandatory disclosures and the hearing file, on the first business day of every month.¹⁷ Additionally, the parties agreed that the NRC Staff is not required to disclose draft versions of privileged Staff documents, but instead is only required to disclose final versions of those documents.¹⁸ However, if a party has legal possession, custody, or control of a “draft” document developed by another party, and which is otherwise subject to mandatory disclosure (i.e., relevant to a contention), then the party possessing the “draft” must produce it unless that party knows that the other party has already disclosed that document.¹⁹

considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for discovery.”).

¹⁵ See Tr. at 424–28.

¹⁶ 10 C.F.R. § 2.336(a)(3). See also 10 C.F.R. § 2.336(b)(5).

¹⁷ Tr. at 470–71.

¹⁸ Id.

¹⁹ The reason for this rule is simple. If the person who developed a document considered it sufficiently final to share it with an external third party (e.g., a party or the NRC Staff) who is a litigant herein, then we do not deem that document, even if it is still labeled “draft,” exempt from the mandatory disclosure requirements. Additionally, the Commission recently noted in the South Texas proceeding that a draft guidance document the Staff intended to rely on when

Challenges to claims of privilege shall take the form of motions for disclosure and thus must meet the requirements set forth in 10 C.F.R. § 2.323.²⁰

Additionally, on March 5, 2010, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel issued a protective order governing access by the Oglala Sioux Tribe and its representatives to sensitive unclassified non-safeguards information (“SUNSI”) in this proceeding.²¹ During the prehearing conference call, the parties indicated that they would be interested in using a protective order similar to the March 5, 2010 order to govern access to nonpublic information for the balance of this proceeding but that they had not agreed upon such an order.²² The Board hereby directs the parties to confer regarding a protective order to govern the balance of this proceeding and to update the Board on or before October 15, 2010 with the results of those discussions.

C. Safety and Environmental Evaluations

According to counsel for the NRC Staff, the Staff currently expects to issue its draft Supplemental Environmental Impact Statement (DSEIS) in June 2011, followed by the final Supplemental Environmental Impact Statement (FSEIS) in January 2012.²³ Additionally, counsel for the NRC Staff stated that the current projected date for the issuance of the Final

evaluating the application at issue in the proceeding would have been subject to disclosure or inclusion in a privilege log but for the fact that it was labeled “draft” and was therefore potentially exempt from disclosure under an agreement by the parties. See South Texas Nuclear Operating Co. (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC __, __ (slip op. at 18-20) (Sept. 29, 2010). This provision attempts to avoid the situation in South Texas for those “draft” documents that a party has already considered sufficiently final to share externally.

²⁰ The parties also agreed to this procedural element. See Tr. at 429.

²¹ Memorandum and Order (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information (SUNSI)) (Mar. 5, 2010) (unpublished).

²² See Tr. at 429–31.

²³ Id. at 459–60.

Safety Evaluation Report (FSER) is October 2011.²⁴ If this proceeding goes to hearing, the hearing schedule will be keyed to the release of the FSEIS and FSER and guided by the model milestones provided in 10 C.F.R. Part 2, Appendix B (II).

So as to keep the Board, the parties, and the public abreast of any changes in this schedule, we hereby direct the NRC Staff to submit a monthly status report on November 1, 2010, to be updated on the first business day of each month thereafter, specifying its best estimate of the dates when it expects to issue the draft and final versions of the SER and SEIS.

D. Summary Disposition

Under 10 C.F.R. § 2.1205(a) “motions for summary disposition may be submitted to the presiding officer by any party no later than forty-five (45) days before the commencement of hearing,” unless the presiding officer or Commission directs otherwise. The parties indicated that they do not believe modification of this time limit is necessary to aid in the preparation for the evidentiary hearing.²⁵

Pursuant to 10 C.F.R. § 2.1205(b), answers to any motion for summary disposition are due within twenty (20) days after the motion is served.

E. Filing of New or Amended Contentions

New or amended contentions filed after the initial petition may be considered either timely or nontimely, depending on when the information on which the contentions are based became available.²⁶ If a new or amended contention is timely, it will be subject to the requirements of 10 C.F.R. § 2.309(f)(2). If it is nontimely, it will be subject to the requirements of 10 C.F.R. § 2.309(c). During the prehearing conference call the parties indicated that they had discussed a timeline for the filing of timely new or amended contentions but had not yet

²⁴ Id.

²⁵ Id. at 432. However, the parties did note that it may be appropriate to revisit the timeline for the submission of motions for summary disposition at a later date. See id.

²⁶ See 10 C.F.R. § 2.309(f)(2)(iii).

reached any definite agreement.²⁷ The Board hereby directs the parties to further discuss a proposed timeline for the filing of timely new or amended contentions and to report back to the Board with the results of those discussions on or before October 15, 2010.

F. Witness Lists and Subpart G

1. Final List of Potential Witnesses

Pursuant to 10 C.F.R. § 2.336(a)(1), parties to this proceeding are required to provide a list of any person “upon whose opinion the party bases its claims and contentions and may rely upon as a witness,” along with a copy of the substantive basis for that person’s opinion. The parties agreed that it is premature at this time to suggest a time limit for filing the final list of potential witnesses for each admitted contention but also noted that they will discuss this issue further at a later point in the course of this proceeding.²⁸

2. Request for Subpart G Proceeding Based on Disclosure of Eyewitness

During the prehearing conference call the Board asked the parties about time limits for motions relating to the use of Subpart G hearings for challenges to the credibility of an eyewitness in this proceeding.²⁹ However, under 10 C.F.R. § 2.310(d) Subpart G hearing procedures for challenges raised to the credibility of an eyewitness are inapplicable to this type of proceeding and thus will not be used in this proceeding.

G. Simplification, Clarification, and Specification of the Issues

In the interest of judicial economy, 10 C.F.R. § 2.329(c)(1) allows for the “[s]implification, clarification, and specification of the issues” during the prehearing conference. Given that some of the admitted contentions involve overlapping issues, the Board recommended that Consolidated Intervenors and the Oglala Sioux Tribe consider the possibility of consolidating

²⁷ Tr. at 432–43.

²⁸ Id. at 443.

²⁹ Id.

overlapping contentions and designating a lead party on those contentions.³⁰ At the time of the prehearing conference, counsel for the Consolidated Intervenors and the Oglala Sioux Tribe had not yet met to discuss these possibilities but both parties agreed to do so.³¹ The Board directs the Consolidated Intervenors and the Oglala Sioux Tribe to discuss the possibility of combining contentions and designating a lead party, and to report back to the Board with the results of their discussions on or before October 15, 2010.

H. Settlement

The issue of settlement was not discussed during the initial prehearing scheduling conference. Nonetheless, the Board reminds the parties that it stands ready to provide assistance, as specified in 10 C.F.R. § 2.338, should the parties indicate that they wish to employ alternative dispute resolution with respect to any or all of the admitted contentions in this proceeding.

I. Evidentiary Hearing Matters

1. Bifurcation of Hearing

The parties agreed that no hearing on safety contentions should be commenced before the Staff's publication of the FSER,³² even though such a hearing is permitted under 10 C.F.R. § 2.332(d). However, because the safety contentions in this proceeding have environmental components, the parties did not agree on whether a unified hearing, in which both the admitted safety and environmental contentions are heard simultaneously, or a bifurcated hearing, in which the safety contentions are heard separately from the environmental contentions, would be

³⁰ Id. at 443–44.

³¹ Id. at 444–46.

³² Id. at 420.

appropriate.³³ The Board will decide at a later date whether a bifurcated hearing or a unified hearing is most appropriate for this proceeding.

2. Subpart N

The parties stated that, at this time, they agree that none of the contentions in this case should be handled according to 10 C.F.R. Part 2, Subpart N.³⁴

3. Initial Statements of Position, Testimony, Affidavits, and Exhibits

Pursuant to 10 C.F.R. § 2.1207, a number of documents must be filed immediately prior to the evidentiary hearing, including initial statements of position, written testimony with supporting affidavits, and exhibits. As agreed to by the parties, the filing of such documents shall be sequential, with the Intervenors filing their initial statements, written testimony, and exhibits first.³⁵ After the Intervenors' documents are filed, the NRC Staff and the Applicant shall submit their initial statements of position, written testimony with supporting affidavits, and exhibits.³⁶ Intervenors will then have a final opportunity to reply to the filings made by the NRC Staff and the Applicant.³⁷ Despite this order of filings, however, the burden of proof remains on the Applicant.³⁸

4. Motions for Cross-Examination

³³ Id. at 420–23. Counsel for the NRC Staff noted that a bifurcated hearing could help to expedite the proceedings and focus the issues, but stated that the NRC Staff does not have a strong opinion on the issue. Id. at 421–22. Counsel for Consolidated Intervenors, however, requested that a hearing on safety contentions should not be commenced earlier than 90 days after the issuance of the FSEIS. Id. at 422.

³⁴ Id. at 423. See 10 C.F.R. § 2.310(h).

³⁵ See id. at 447–52. However, simultaneous filings may still be used, at the discretion of the Board, with regard to questions proposed by the Board. See id. at 450, 452.

³⁶ See id.

³⁷ See id.

³⁸ See 10 C.F.R. § 2.325.

No later than ten (10) days after all written testimony has been filed on a contention, all parties shall file any motions or requests to allow that party to conduct cross-examination of a specified witness or witnesses, together with the applicable cross-examination plan, in accordance with 10 C.F.R. § 2.1204.³⁹

J. Additional Considerations Regarding Motions

In accordance with 10 C.F.R. § 2.323(b), motions (including requests of any kind) will be rejected if they do not include a certification by the attorney or representative of the movant that, prior to filing the motion or request, he or she has made a “sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion” or request. The Board believes that in order to be sincere, the effort should not be initiated at the last minute. Rather, it should be made sufficiently in advance to provide at least some reasonable time for the possible resolution of the matter or issues in question. In the case of a motion for summary disposition, the Board suggests that the “sincere effort” should include informing the opposing party or parties, prior to filing the motion, of the material facts about which the movant believes there is no genuine dispute. Likewise, the opposing party must be prepared to respond very promptly, advising whether it agrees that there is no genuine dispute concerning those facts.

A motion, opposed or unopposed, for extension of time or for modification of this schedule shall be filed as soon as the movant knows or should know of the facts, circumstances, or grounds for the motion, and in no event later than 11:00am Eastern Time on the day preceding the applicable deadline. The motion shall inform the Board of the position of the other parties regarding the requested extension. A motion for extension or modification filed after the applicable deadline will be summarily denied unless it is accompanied by a sworn declaration or affidavit from the counsel or representative of the party that describes very extraordinary circumstances explaining why the motion was not filed earlier and otherwise

³⁹ See Tr. at 452–55.

justifies the requested extension. Opposed motions for extension or modification shall address the factors specified in 10 C.F.R. § 2.333(b).

K. Additional Matters

1. Site Visit

The parties agreed that a seasonally appropriate site visit would be useful to the Board.⁴⁰ Accordingly, the Board directs the parties to discuss proposed dates and parameters for such a site visit and to report back to the Board on or before October 15, 2010 with the results of those discussions. The Board will review the proposed dates and parameters for the site visit before deciding whether such a visit would be both beneficial and appropriate.

2. Venue

The parties indicated their preference that any hearing in this proceeding be held in the vicinity of the proposed Dewey-Burdock In Situ Uranium Recovery Facility in Custer and Fall River Counties, South Dakota.⁴¹ The parties specifically mentioned that the courthouses in Custer, Hot Springs, and Rapid City, South Dakota, would be appropriate venues for holding the evidentiary hearing.⁴² In addition, the parties noted that other local meeting centers, including the Mueller Civic Center in Hot Springs, South Dakota, may be appropriate venues for the evidentiary hearing.⁴³ The Board will review the venues proposed by the parties and determine the ultimate location for the evidentiary hearing at a later date.

⁴⁰ Id. at 455.

⁴¹ See id. at 460–63.

⁴² Id.

⁴³ Id. at 462.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
POWERTECH (USA) INC.) Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility)
Source Materials License Application))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Board **ORDER (Prehearing Conference Call Summary and Initial Scheduling Order)**, dated October 4, 2010, have been served upon the following persons by Electronic Information Exchange.

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA

ORDER (Prehearing Conference Call Summary and Initial Scheduling Order)

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[Original signed by Linda D. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 4th day of October 2010.